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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RONALD JARRETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether petitioner presented a valid claim of vindictive prosecution under the doctrine of *Blackledge v. Perry* which prohibits prosecution or punishment of a defendant for exercising his constitutional rights.

2. Whether the Court of Appeals erroneously held that petitioner's claim of vindictive and selective prosecution was waived by failure to raise it under Rule 12(b) prior to trial, and whether the District Court's actions should be interpreted as granting relief from any waiver.

3. Whether errors and omissions of trial counsel, including waiver of a claim which in effect constituted petitioner's only defense by failure to comply with the time limitations of Rule 12(b), denied him effective assistance of counsel.

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In The

Supreme Court of the United States

October Term, 1982

RONALD JARRETT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Ronald Jarrett hereby petitions that a writ of certiorari be issued to review the judgment and opinion of The United States Court of Appeals for the Seventh Circuit entered on April 5, 1983.

OPINION BELOW

The judgment and opinion of The United States Court of Appeals for the Seventh Circuit was entered on April 5, 1983 (No. 82-1128) and is reported at 705 F.2d 198 (7th Cir. 1983). The opinion is attached hereto as Appendix 1.

JURISDICTION

The judgment of The United States Court of Appeals for the Seventh Circuit (App. 1) was entered on April 5, 1983, affirming the petitioner's conviction dated January 21, 1982. A petition for rehearing was denied on June 8, 1983. The jurisdiction of this court is invoked under and pursuant to 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the Constitution of The United States (Due Process Clause):

> "No person shall . . . be deprived of life, liberty or property, without due process of law . . ."

Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Federal Rules of Criminal Procedure, Rule 12:

* * *

> "(b) **Pretrial Motions.** Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceeding); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14."

* * *

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

STATEMENT OF THE CASE

On December 15, 1977, Alfred's Orange Blossom Jewelry Store, in Chicago, Illinois, was robbed by two gunmen of approximately $39,000.00 in diamonds, watches and yags (phony diamonds), and $3,000.00 in cash (Tr. 41). Approximately three years later on or about October 29, 1980, petitioner was charged by a federal grand jury in a one-count indictment with the robbery, in violation of the Hobbs Act (18 U.S.C. Sec. 1951) (R. 1).

Sometime during 1978, petitioner became a suspect in an unrelated investigation of another offense conducted by Department of Justice Attorney S. Gay Hugo of the Department of Justice Strike Force in Chicago, Illinois,

before the Special September 1978 Grand Jury. Sometime prior to November of 1978 F.B.I. Agent Pecoraro attempted to contact Petitioner as a suspect (R. 32). In March of 1979, Agent Pecoraro served petitioner with a grand jury subpoena. Petitioner appeared before the grand jury on April 11, 1979, and refused to testify on the grounds of his Fifth Amendment privilege against self-incrimination (R. 32, 40, 61).

Just eight days later, on April 19, 1979, Department of Justice Strike Force Attorney S. Gay Hugo obtained an indictment charging petitioner with unlawful possession of a firearm three and one-half years earlier. The firearms charge had already been the subject of a State Court prosecution which terminated when the court found no probable cause for the traffic stop of petitioner which resulted in the seizure of the firearm (R. 32, 40).

Petitioner moved to dismiss the federal firearms prosecution on the grounds of vindictive prosecution and preindictment delay. Although the district court denied the motion to dismiss, in finding no probable cause for the arrest of petitioner, as the State Court had found earlier, the district court noted "irregularities" in the case which it found "particularly troubling" and also observed:

> [T]he return of the indictment only eight days after the defendant exercised his right to remain silent before another grand jury on an unrelated investigation is almost incredible. In view of the court's resolution of the motion to suppress, no further comment on these aspects of the case need be made. (R. 40)

The government did not appeal from the district court's finding of no probable cause, and the case was later dismissed (R. 32).

While the firearms case was pending, F.B.I. Agent Pecoraro and another agent who were working with the

Strike Force and the grand jury on the original investigation in which petitioner was a suspect, began looking into the Orange Blossom robbery, the subject of the instant prosecution. In June of 1979, they located and told one David Willis, who admitted committing burglaries and robberies in 1977 and 1979 and who was one of the alleged gunmen in the Orange Blossom Robbery, that he could get on a "witness protection program" if he told them what he knew about the Orange Blossom robbery (R. 153-157, 174-80). Willis admitted that he was one of the gunmen who had robbed the Orange Blossom (R. 153-57, 180-81). Later, in September of 1979, they contacted one Ronald Brown, who was incarcerated in the Cook County Jail on two pending burglary charges. Brown had been an informant for the F.B.I. since September of 1978, during which he was paid by the F.B.I. and while so employed by the F.B.I., gave them bogas information and committed a number of burglaries. During this time he had told Special Agent Gorman about the Orange Blossom robbery and said that it was organized by a guy named Joe Rodriquez (a/k/a Joe Zito), who used two men from Indiana to commit it. Brown never mentioned petitioner to the agents at this time, but claimed at trial, when he testified against petitioner, that he was lying then (R. 280-84).

When Brown talked to Agent Pecoraro in September of 1979, he admitted that he was the other gunmen in the Orange Blossom robbery, but this time claimed that petitioner also participated in the robbery and acted as a "lookout". Two weeks later, Brown was released from custody. (R. 259-60, 263-66, 270).

The F.B.I. recommended an attorney for Brown and the burglary charges were ultimately dismissed at the request of the F.B.I. (R. 263-66, 270). During September, 1979 Brown was relocated and given a new identity. The F.B.I. paid his rent and utility bills, as

well as $20 per day for food for Brown and his family (R. 214-17). In October of 1979 Willis, the other gunman, was also relocated by the government, given a new identity and assisted in finding employment. He was paid $14,000.00 by the government for various expenses. In addition, the government paid for his housing, utilities and furnishings (R. 143-45).

Almost one year later, on October 29, 1980, the Special September 1978 Grand Jury (the same grand jury which had been conducting the original investigation before which petitioner had refused to testify) indicted petitioner for a violation of the Hobbs Act based on the Orange Blossom robbery. This indictment was also obtained by Special Attorney Hugo of the Department of Justice Strike Force (R. 1).

Prior to trial petitioner asked his attorneys[1] whether this was a proper federal case, and discussed with them the fact that this case appeared to be an effort by the Government to retaliate against him and harass him owing to his refusal to testify. Petitioner stated in his affidavit that both attorneys told him that it appeared the Government was trying to "get" him, and that they knew what it was "all about." Petitioner informed both attorneys of this indictment in the federal firearms case, filed about one week after his grand jury appearance, which was pending before Judge Roszkowski, and discussed it with Mr. Walsh, one of his attorneys, in the presence of another attorney who represented him in

[1] These conversations are related in petitioner's affidavit filed in support of his claim that he was denied effective assistance of counsel by failure of trial counsel to move to dismiss the indictment on the grounds of vindictive and discriminatory prosecution. On September 2, 1982, the Court of Appeals granted petitioner's motion to file the affidavit as a supplemental record.

the firearms case. Petitioner asked whether this case could be dismissed before trial on grounds that the Government was retaliating against him and harassing him, and his attorneys told him that they had to go to trial before his claims of retaliation and harassment could be raised. Petitioner stated in his affidavit that he continually asked them when the claims would be raised, and they repeatedly told him that they would be raised later. Petitioner stated that Mr. Lydon, one of his attorneys, told him that his claims were the strongest part of his case and both attorneys mentioned "vindictiveness". Petitioner's affidavit states that he was never told that failure to make the claims prior to trial would result in waiver, that he would have insisted that these claims be raised before trial if he knew that this was required, and that he was relying on the expertise and judgment of his attorneys.

Trial on the Orange Blossom robbery charges began on December 15, 1980. On the second day of the trial, counsel for the petitioner informed the court that he wanted to file a motion raising the issues of prosecutorial vindictiveness and pre-indictment delay (Tr. 75-76). In response, the district court said:

> THE COURT: Well, you go ahead and do that. You can do that at the appropriate time. (Tr. 76)

During the testimony of Brown and Willis, the two gunmen, defense counsel failed to object to the government's leading questions concerning the benefits they had received from the government in exchange for their testimony. Defense counsel did not object to the identification by Brown and Willis of the handgun allegedly carried by Brown during the robbery, nor was either witness cross-examined on this point. Willis was allowed to testify, also without objection, to hearsay statements by one Joseph Rodriquez, also known as Joe Zito, who

allegedly told Brown and Willis that petitioner was planning the robbery. Willis also testified, also without objection by defense counsel, to other statements by Zito after the robbery concerning alleged hearsay conversations with petitioner (Tr. 162-64, 244-45).

Although Willis claimed that on the day of the robbery he traveled to the Orange Blossom in petitioner's car, Brown testified in direct contradiction to Willis, that he (Brown) rode to the Orange Blossom in petitioner's car, but this difference was not explored on cross-examination of Brown.

Defense counsel also failed to object to admission in evidence of invoices for jewelry purchased by Orange Blossom during the year, when exhibits were offered to show the jurisdictional element of interstate commerce, although there was no testimony that the items reflected in the exhibits were taken during the robbery.

During cross-examination petitioner denied participation in the robbery, and denied that he owned any police scanners or walkie-talkies, or had any in his home when he was visited by agents in April of 1978 (Tr. 303-05). There was no objection to their questions by defense counsel. In rebuttal, an agent was allowed to testify over objection that he had been in petitioner's home in April of 1979, sixteen months after the robbery and one year after the time referred to by petitioner, and had seen three walkie-talkies in a closet in petitioner's bedroom (Tr. 329-30). However, defense counsel did not object and in fact agreed to an instruction on impeachment which specifically mentioned the testimony about walkie-talkies in his home in April of 1979.

Although Brown and Willis were admitted participants in the robbery, defense counsel did not request a standard instruction on "accomplice" testimony. Later,

during closing arguments, defense counsel told the jury that the testimony of all witnesses was to be judged by the same standard (Tr. 347).

On December 18, 1980, the jury returned a verdict of guilty. On December 27, 1980, petitioner filed a motion raising the issue of selective and prosecutorial vindictiveness and requesting a hearing on the claim (R. 32).

Two months later, on February 17, 1981, other counsel appeared for petitioner, and asked that sentencing be continued to permit full exploration of the issue of the court's jurisdiction and prosecutorial vindictiveness. The court replied:

> THE COURT: Well, you are certainly entitled to raise any points that you want . . . and if you find something to bring to my attention, why, you are certainly welcome to do so and I would expect you to do it. (R. 40 at p. 8)

The following colloquy between former counsel and the district court also took place:

> MR. LYDON: . . . I am wondering whether you received the post trial motions that we filed to dismiss, one, for vindictive prosecution—
>
> THE COURT: Yes, I have those but I assumed that you were going to present them and I was going to suggest today—
>
> * * *
>
> . . . that obviously there is going to have to be some kind of a hearing . . . in connection with the contentions raised by—I am aware of the fact that you filed such motions and I assumed that the hearing was going to go ahead covering that (as well as the Government's dangerous special offender petition). (*Id.* at 11).

On March 27, 1981, the government filed a lengthy response directed to the merits of petitioner's claims, but did not assert that such claims were waived by failure to bring them prior to trial, and did not dispute petitioner's right to a hearing (R. 61).

On June 23, 1981, the district court denied petitioner's claim of unlawful preindictment delay, but observed that a hearing of some kind would be required on the other claims. The Court said:

> "The government has given, through affidavits, reasonable explanations for its actions. But these affidavits have not been tested by cross-examination. Indeed, the fact that the government felt it necessary to respond to this motion with its own evidentiary showing lends further support to this court's conclusion that some limited hearing should be required to determine whether there may be reasonable doubt as to the prosecutor's motive in this case.
>
> Thus, even though defendant has not yet raised a reasonable doubt in the court's mind to warrant a full scale evidentiary hearing, the court will give the defendant the opportunity to present what evidence he currently has to cross-examine the government's affiants in this hearing." (R. 70 at 7).

Also on June 23, 1981 the government for the first time asserted that petitioner had waived his claims by failure to present them prior to trial under Rule 12(b), but the court ordered an evidentiary hearing (R. 70-71).

However, on July 30, 1981, the date set for an evidentiary hearing, the district court ruled that petitioner's claims had been waived by failure to raise them by pretrial motion under Rule 12(b). (Transcript by July 30, 1981).

Just before sentencing petitioner filed a motion asserting that he was denied effective assistance of trial counsel, which was denied by the district court. (R. 61). Subsequently, petitioner filed an affidavit in support of his claim of ineffective assistance of counsel based on failure of trial counsel to raise the claims of vindictive and selective prosecution and preindictment delay prior to trial. (Supp. R.)[2] On September 17, 1981, petitioner was sentenced to 25 years imprisonment as a special dangerous offender (R. 99).

On appeal, the Court of Appeals for the Seventh Circuit affirmed petitioner's conviction. The Court held that petitioner's claim of selective prosecution was waived by failure to raise it prior to trial pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure. As to the claim of vindictive prosecution, the Court observed in a footnote that "this is not the type of situation which falls within the perimeters of a vindictive prosecution defense." (Opinion, p. 8, fn. 8). The Court refused to reach the issue of whether petitioner had been relieved of any waiver because petitioner "never requested such relief from the district court." (Opinion, pp. 10-11). The Court also held that the petitioner's claim of effective assistance of counsel was not properly before the court even though petitioner has been given leave to add this argument to his brief.

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[2] The facts stated in petitioner's affidavit are summarized in this statement, supra at pp. 6-7.

REASONS FOR GRANTING THE WRIT

1.

PETITIONER HAS STATED A VALID CLAIM OF VINDICTIVE AND SELECTIVE PROSECUTION.

Certiorari should be granted because this case presents a number of questions concerning the scope of this Court's prior rulings prohibiting vindictive prosecutions following a defendant's exercise of his constitutional rights. This Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969) held that Due Process requires that a defendant be free of the "fear of vindictiveness" which may unconstitutionally deter him from exercising his right to appeal or collaterally attack his conviction. Subsequently in *Blackledge v. Perry*, 417 U.S. 21 (1974) this Court held, following *Pearce*, that it was not constitutionally permissible for the State to bring a more serious charge in response to a defendant's request for a trial *de novo* because due process "requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process." (417 U.S. at 28) The principle underlying both these and subsequent decisions prohibiting vindictive prosecution is that Due Process does not permit the prosecutor to punish a person for "doing what the law plainly allowed him to do." (*United States v. Goodwin*, 73 L. Ed. 2d at 87).

As observed by one court,

> "Little substantive difference can be detected between selective prosecution and vindictive prosecution." (*United States v. Wilson*, 639 F.2d 500, 502 (9th Cir. 1981)).

The court went on to observe that vindictive prosecution arises when the government increases the severity of alleged charges in response to defendant's exercise of

constitutional rights, and selective (or discriminatory) prosecution occurs where defendant is prosecuted initially for having exercised a constitutional right. (639 F.2d at 502). But the interests involved are the same in both selective and vindictive prosecution:

> "the defendant seeks protection from criminal prosecution initiated punitively, in response to the exercise of his constitutional rights." (639 F.2d at 502)

But frequently the vindictive motive is also present in the case of discriminatory or selective prosecution. As stated in *United States v. Bourque*, 541 F.2d 290 (1st Cir. 1976),

> ". . . personal vindictiveness on the part of a prosecutor or the responsible member of the administrative agency recommending prosecution would also sustain a charge of discrimination." (541 F.2d at 293)

Petitioner in the instant case raised the claim that the prosecution against him was both vindictive and discriminatory. It was vindictive because it followed and was motivated by a desire to retaliate against him and punish him for his refusal to testify before the grand jury in the original investigation. It was discriminatory because petitioner was prosecuted under the Hobbs Act (18 U.S.C. Sec. 1951) for the robbery of a local jewelry store, when vitually hundreds of local robberies never give rise to Hobbs Act prosecutions. Petitioner's claim was further supported by the fact that immediately after he exercised his Fifth Amendment privilege, the government brought a three year old weapons prosecution against petitioner based on an arrest which the State Court had previously found to be lacking in probable cause, and by the fact that federal agents sought out and made arrangements for the principal witnesses against the petitioner in the instant case to be paid and placed in a "witness protection program" in exchange

for their testimony against petitioner. The original investigation, the subsequent weapons prosecution and the instant prosecution were all under the direction of the same Department of Justice Strike Force Attorney, and the indictment against petitioner in the instant case was returned by the same special grand jury before which he had claimed his Fifth Amendment privilege not to testify. So strong was the appearance of vindictiveness that the district judge in the weapons case noted "irregularities," found it "particularly troubling" and observed that it was "almost incredible," but did not find it necessary to rule on petitioner's motion to dismiss based on vindictive prosecution because he granted petitioner's motion to suppress the evidence.

Although these facts obviously support the *prima facie* inference that petitioner's refusal to testify in reliance upon his constitutional rights resulted in not just one but two prosecutions against him, the Court of Appeals held that petitioner did not present a claim of vindictive prosecution because this ". . . is not the type of situtation that falls within the perimeters of *Blackledge v. Perry*." (opinion p. 8 fn. 8) The court explained that petitioner's claim of vindictive prosecution fails because "vindictive prosecution has as its basis an increase in charges or a new prosecution allegedly brought in retaliation for the exercise of constitutional rights" and here "there is a single prosecution, and no increase in charges" (*Id.*) The court further observed that petitioner "apparently wishes to equate his appearance as a witness before the grand jury with a criminal proceeding against him personally." (*Id.*)

To the extent that the Court of Appeals implies that the proceeding before the grand jury was not a proceeding against petitioner personally, it is inconsistent with the fact that petitioner was regarded as a suspect in the original grand jury investigation. Agent Pecoraro testi-

fied that petitioner was contacted as a suspect in the original investigation, and the Government admitted in the trial court that petitioner was a suspect (Government's Response to Defendant's Motions to Arrest Judgment and Judgment of Acquittal, pp. 11-12). Moreover, there was not just a "single prosecution" but two prosecutions following petitioner's exercise of his constitutional rights. After petitioner successfully defended against the weapons prosecution, he was prosecuted for the Orange Blossom robbery in the instant case.

To be sure, the court of appeals may be technically correct and seems to have followed the prevailing views as to *Perry*, namely, that there must be an increase in charges based upon the same facts which supported a previous charge in which the defendant relied upon his constitutional rights. However, where the prosecution is initiated with a vindictive motive in order to punish a person for exercising his constitutional rights, it makes little sense not to call it by the name of "vindictive prosecution." By granting certiorari the Court can consider the question of whether the constitutional prohibition against vindictive prosecution is limited to those situations illustrated by *Pearce* and *Perry*, as the Court of Appeals assumed, or whether all retaliatory prosecution for the exercise of constitutional rights is prohibited by due process of law.

The timing of the prosecutions against petitioner in the instant case as well as the stale nature of the charges supports an inference of a reasonable likelihood of vindictiveness. In granting a defense motion to dismiss an indictment on the grounds of prosecutorial vindictiveness, the district court in *United States v. Velsicol Chemical Corp.*, 498 F. Supp. 1255 (D.D.C. 1980) said:

> "When, as in this case, the government chooses not to lodge charges for a period of time and then

> makes the decision to prosecute so close after a defendant elects to exercise his rights in the face of prosecution opposition, apparent vindictiveness is established. Indeed, the question of the delay and the timing of the present indictment is crucial." (498 F. Supp. at 1264-65)

This case is an appropriate vehicle for further clarification of *Perry* because, as in the *Velsicol* case, the timing of the charges against petitioner "strongly indicates a retaliatory motive." (498 F. Supp. at 1265)

The existence of apparent vindictiveness under the facts of the instant case is also supported by *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) where this Court contrasted the "give and take" of plea bargaining where a defendant is free to accept or reject the prosecutor's offer with the "unilateral imposition of a penalty upon a defendant who has chosen to exercise a legal right to attack his original conviction." (434 U.S. at 362) When petitioner appeared before the grand jury in the instant case he was not given a choice of testifying or facing indictment on other charges. Rather, after petitioner had exercised his right not to testify, the subsequent charges constituted the "unilateral imposition of a penalty" on petitioner for the exercise of that legal right.

Subsequently, in *United States v. Goodwin*, ... U.S. ....., 73 L. Ed. 2d 74 (1982), in which defendant was charged with a felony after refusing to plead guilty to misdemeanor charges, the court refused to apply a presumption of vindictiveness under the circumstances of that case, but reaffirmed the general principle underlying vindictive prosecution cases, and pointed out that a defendant must be free from actual vindictiveness:

> "In declining to apply a presumption of vindictiveness, we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging

> decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do." (73 L. Ed. 2d at 87)

The importance of avoiding personal vindictiveness was also expressed by this Court in *Colton v. Kentucky*, 407 U.S. 104 (1972) where, in finding no due process violation in the Kentucky two-tier system permitting trial *de novo* before a different judge, the Court remarked that there was little chance of "personal vindictiveness" before a different jury because it has no "personal stake in the prior conviction and no motivation to engage in self-vindication." (412 U.S. at 17)

In contrast, question of personal vindictiveness is present here because the earlier investigation during which petitioner refused to testify and both subsequent indictments were obtained by the Department of Justice Strike Force Special Attorney Hugo rather than treated as routine matters prosecuted by an Assistant United States Attorney in the ordinary course of business. In fact, it is entirely fair to say that neither the weapons charge nor the very unusual Hobbs Act robbery charge would have been brought against petitioner in the ordinary course of business. This case is therefore stronger for petitioner than *Perry* where the Court observed that

> "There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry." (417 U.S. at 28)

In contrast, here petitioner has claimed that the particular prosecutor was actually motivated "to engage in self-vindication" when petitioner refused to testify before the grand jury in the investigation which she was conducting. As one Court of Appeals observed as to the facts of *Blackledge v. Perry*:

> "Anyone who assessed these facts objectively, would conclude that the prosecutor had retaliated against

the defendant." *United States v. Andrews*, 633 F.2d 449, 453 (6th Cir. 1980) (*en banc*).

In *Goodwin* this Court observed that the broad principle that Due Process forbids punishment of a person because he has done what the law plainly allows him to do underlies the line of cases beginning with *North Carolina v. Pearce* and is in itself uncontroversial. The principle itself is too basic to be limited merely to cases in which an attack on a previous conviction results in an increased charge. This is an appropriate case for this Court to recognize, as the Court of Appeals refused to do, that the Due Process prohibition against vindictive and retaliatory prosecution also protects petitioner and others similarly situated from the vindictive motives of a prosecutor.

2.

PETITIONER DID NOT WAIVE HIS CLAIM OF VINDICTIVE AND SELECTIVE PROSECUTION.

This Court should grant certiorari also to consider the question raised by the erroneous holding of the district court and court of appeals that petitioner waived his claim of vindictive and selective prosecution by failure to raise the claim prior to trial pursuant to Rule 12(b) of the Federal Rules of Criminal Procedure.

1. The Court of Appeals reached the conclusion that petitioner's claims had been waived only because it rejected completely his characterization of his claim as one of vindictive prosecution, characterized it as solely a claim of "discriminatory" prosecution and then cited some authority for the proposition that a claim of discriminatory prosecution must be raised prior to trial under Rule 12(b). As already pointed out above, the mischaracterization of the claim does not change the fact that petitioner has made a *prima facie* showing that this prosecution was both vindictive and discriminatory.

2. The contention that petitioner's claims were not waived is supported by the Advisory Committee Notes and the 1975 amendments to Rule 12(b)(1) and (2) which describe those objections and defenses which *must* be raised prior to trial to include irregularities in the grand jury proceedings and defects in the indictment or information (other than lack of jurisdiction or failure to state an offense) (*Notes of Advisory Committee on Rules*, Rule 12, 18 U.S.C. at 167). Professor Wright has pointed out that categories (1) and (2) also include misjoinder of offenses or defendants, multiplicity, duplicity and failure of the magistrate to follow the rules. (Wright, *Federal Practice and Procedure: Criminal 2d* § 193 at 700). In contrast, those objections and defenses which a defendant *may* raise by motion prior to trial (but which are not waived if not raised) include such matters as former jeopardy, statute of limitations, immunity, lack of jurisdiction and failure of the indictment or information to state an offense. (*Notes of Advisory Committee* at 167)

The claims of selective and vindictive prosecution are not "defects in the institution of the proceedings" like those described by the Advisory Committee, but are analogous to a claim that prosecution is barred by double jeopardy, which could not be cured and would preclude the prosecution from calling upon a defendant to answer the charges at all. Significantly, this Court in *Perry* compared a claim of vindictive prosecution to a claim of former jeopardy. (417 U.S. at 30) Since a claim of selective prosecution is similar to a claim of vindictive prosecution, both should be treated like a claim of double jeopardy and not considered waived if not raised prior to trial.

3. Petitioner's contention that his claim of vindictive and selective prosecution is not the type of correctable "defect in the institution of the proceedings" contem-

plated by the waiver provision of Rule 12(b) is also supported by this Court's discussion of the waiver provisions under the prior rule in *Davis v. United States*, 411 U.S. 233 (1973) where the court explained that:

> "The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial." (411 U.S. at 241)

This observation obviously contemplates limitation of the waiver provisions to defects which could be *cured* before trial. It is extremely reasonable that such claims must be raised prior to trial because failure to do so might result in the burden and expense of a trial *followed by the burden and expense of another trial.* There is no such possibility with claims such as vindictive prosecution, discriminatory prosecution and double jeopardy because once these claims have been successfully raised, there will not be another trial.

To be sure, the trial which was held might have been avoided if the claim had been successfully raised prior to trial, but by the same token a hearing on the discriminatory and vindictive motives of the prosecution might have been avoided entirely by the return of a verdict of not guilty. Where as here either the return of a verdict of not guilty or a favorable ruling on defendant's motion to dismiss would also terminate the prosecution, the convenience of all concerned may be served by proceeding to trial first. For example, in petitioner's case the indictment was returned on October 23, 1980, the case proceeded to trial less than two months later and the actual trial took only three days. In contrast, the pro-

ceedings resulting from petitioner's motion to dismiss on the grounds of vindictive and discriminatory prosecution continued over a period of over seven months, and a hearing would have involved several days of testimony and numerous exhibits.

Further support for these contentions is gleaned from the *Davis* Court's explanation, in support of its interpretation of the waiver provision of Rule 12(b), that:

> "If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." (411 U.S. at 241).

The Court's reference here to "reprosecution" obviously contemplates the kind of errors which are "curable" and which would not bar reprosecution after a successful post trial motion or appeal.

4. There is something highly perverse and unfair in applying the waiver rule to a situation in which it did not occur to any of the lawyers involved on either side nor to the district judge that there was any possibility of waiver until after several months had passed, the government had responded on the merits and the district judge had set the matter for a hearing. The district court, as well as Counsel for the government obviously assumed that the petitioner's claim could be raised after trial and in fact when counsel for petitioner first brought up the subject, the district court informed him that it could be raised "at the appropriate time" (Tr. 76). Given the fact that the trial was already in progress, the dis-

trict court's reference to "the appropriate time" obviously referred to after trial.

The waiver provisions of Rule 12(b) should be a "bright line" rule which makes clear to counsel and the court what claims will be waived if not raised prior to trial. When, as here, reasonable men do not even think of waiver until several months after the claim has been raised and until the parties have devoted considerable time to briefing and arguing the merits of the claim, the waiver rule has no reasonable application and serves only as "an airtight system of forfeitures." *Fay v. Noia*, 372 U.S. 391 (1963).

To hold otherwise and permit this characterization of the claim as selective rather than vindictive to control application of the waiver provisions of Rule 12(b)(2) is to engage in a kind of "shell game" with petitioner.

5. This Court should also grant certiorari to consider whether or not the actions of the trial court in delaying sentencing for nine (9) months, permitting the parties to address the merits of petitioner's claim, and setting the matter for an evidentiary hearing constituted "relief from waiver" pursuant to Rule 12(b). When counsel for petitioner first raised the point during trial, the trial court invited counsel to "go ahead and do that. You can do that at the appropriate time." (Tr. 76) This invitation by the district court compares most favorably to the court's statement in *United States v. Oaks*, 508 F. 20, 1403 (9th Cir. 1974) where the district court, in response to counsel's statement that he wanted to raise the point of discriminatory prosecution, "All right. The point is duly noted." The Court of Appeals held that this statement constituted "relief from waiver" within the meaning of the prior waiver provisions of Rule 12(b)(2) (508 F.2d at 1405) Surely, in the instant case, the district court's invitation to file the motions "at the appropriate

time" should similarly be construed as "relief from waiver."

Moreover, if there was any doubt about the district court's remarks during trial, its subsequent actions affirmatively support the conclusion that relief from waiver was allowed. When new counsel filed his appearance two months after trial, and asked for sentencing to be continued so as to permit full exploration of the question of vindictive prosecution, the district court remarked that counsel was "certainly entitled to raise any points that you want." (R. 40 at p. 8) A few minutes later, with reference to the motion to dismiss based on vindictive prosecution filed by the trial counsel, the court apparently in reference to its remark during trial that the point could be raised at "the appropriate time," said that "I assumed you were going to present them." (*Id.* at 11) The court then remarked that ". . . obviously there is going to have to be some kind of a hearing" in the connection with the claim of vindictive and discriminatory prosecution. (*Id.* at 11) If the trial court's remarks during trial did not constitute relief from waiver, was such relief not granted by the trial court's remarks just quoted?

But there is more to support petitioner's contention that relief from waiver was granted. In June, six months after trial, the court stated that the government's affidavits had not been tested by cross-examination and again observed that ". . . The fact that the government felt it necessary to respond to this motion with its own evidentiary showing lends further support to this court's conclusion that some limited hearing should be required to determine whether there may be reasonable doubt as to the motive in this case." (R. 20 at 7) The government then, for the first time, asserted that petitioner had waived his claims, but the court nevertheless set the cause for a hearing on July 30, 1981. Did not this consti-

tute "relief from waiver"? Does the fair administration of justice permit the district court to lead counsel to believe that there has been no waiver for several months, and then inexplicitly and suddenly change its mind?

In the face of such overwhelming evidence in support of the obvious conclusion that the district court had intended to and in fact did grant relief from waiver (before inexplicably changing its mind eight months after trial), the Court of Appeals refused to reach the issue of whether petitioner could have been relieved of his waiver "since he never requested such relief from the district court." (Opinion, p. 11) Certainly both the district court and the court of appeals have violated this Court's injunctions against overly rigid or formalistic interpretation of the federal criminal rules. (*Fallen v. United States* 378 U.S. 139 (1964) Certiorari should be granted so this Court can offer guidelines as to when and under what circumstances the actions of the district court constitutes "relief from waiver."

6. Although petitioner contended that the government, by responding on the merits and by failure to raise its claim of "waiver" until several months after trial, had "waived" its right to assert that petitioner's claim had been waived, the court of appeals rejected this claim in a footnote as "completely without merit." (Opinion, p. 11 fn. 11) But if the waiver provisions of Rule 12(b) are designed to save the time and expense of the government and court by avoiding useless proceedings, do not the same considerations apply to the resources of petitioner? After the district court invited petitioner to raise his claims of discriminatory and vindictive prosecution in February, counsel for petitioner investigated, spent days in legal research and brief writing, submitted motions for discovery and briefs on the merits and made numerous court appearances, all for nothing apparently because at the last minute the

government cried "waiver" and rendered useless the last six months of work. Petitioner and his counsel had certainly relied on the good faith of the government and the court in spending time and money getting ready for a hearing. Under the circumstances, should not the government and the court have been equitably estopped from raising the question of waiver at the last minute?

7. This case certainly illustrates the need for additional guidance on the question of which claims are and which claims are not waived by failure to raise them prior to trial. Both petitioner and his counsel were well aware of petitioner's claim of discriminatory and vindictive prosecution and in fact counsel stated to petitioner that it was the strongest part of his case. (Supp. R.) There was obviously no intention that the claim be waived or abandoned by waiting until after trial to raise it. There was obviously no waiver in the sense of an "intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst*, 304 U.S. 458, 464) Under the circumstances of this case, this is certainly sufficient to show cause for relief from waiver under Rule 12(b) (*Davis v. United States*, 411 U.S. 233, 255) (Marshall, J., dissenting) To hold otherwise is simply to apply "an airtight system of forfeitures" (*Fay v. Noia*, 372 U.S. 391, 432).

3.

PETITIONER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL.

Assuming for the moment that the court of appeals is correct in its conclusion that petitioner's claim of vindictive and selective prosecution was waived by failure to raise it prior to trial, is not such a waiver a denial of effective assistance of counsel as guaranteed by the Sixth Amendment? This contention must be viewed in

the context of the following facts: (1) There was an appearance of vindictiveness resulting from the fact that petitioner was indicted only a week after he had refused to testify in another investigation before the grand jury under circumstances which another district judge found to be "almost incredible" and "particularly troubling"; (2) The type of local robbery with which petitioner was charged almost never gives rise to a federal charge of robbery under the Hobbs Act; (3) Petitioner's counsel were aware of the prior judge's views and told petitioner prior to trial in the instant case that the motion to dismiss on grounds of vindictive and selective prosecution which they waived was the strongest part of the case; (4) Petitioner himself wanted the point raised and would have insisted that it be raised prior to trial if he had known that failure to do so would have constituted waiver; and (5) There was no conceivable tactical advantage to be gained from not raising the point prior to trial. Under the circumstances, it was ineffective assistance of counsel for petitioner's lawyers to allow his claim to be subject to forfeiture, just as it would be incompetence for a lawyer entrusted with the responsibility of filing a personal injury lawsuit to forfeit the claim by failure to file within the statute of limitations.

The Sixth Amendment requires the effective assistance of counsel performing within a minimum standard of competency or "within the range of competence demanded of attorneys in criminal cases" *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Speaking to this standard, the Court of Appeals for the Fifth Circuit has observed that

> ". . . a lawyer who is not familiar with the facts and the law relative to his client's case cannot meet the required minimum level." *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974)

The Eighth Circuit has held that

> ". . . trial counsel fails to render effective assistance when he does not exercise the customary skills and diligence that a reasonable competent attorney would perform under similar circumstances." *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976)

The Eighth Circuit in *Easter* held that under the circumstances present in that case failure of counsel to question the search and seizure on the Fourth Amendment grounds constituted ineffective assistance of counsel and in so doing observed that it is fundamental to afford a defendant in a criminal case a fair trial "that his counsel assert that which may be his only defense." (539 F.2d at 666)

Applied to the circumstances of this case, these standards certainly require a holding that petitioner was deprived of the effective assistance of counsel. Counsel for petitioner surely was not familiar with "the law relative to his client's case" if he did not know that failure to raise petitioner's claim would constitute waiver under Rule 12(b) of the Federal Rules of Criminal Procedure. A lawyer not familiar with the rules surely does not fall "within the range of competence demanded of attorneys in criminal cases" as required by *McMann v. Richardson*. In this context it should be pointed out that this is not the type of "waiver" which results from a tactical decision made during trial not to object to a particular question or not to raise a particular point in favor of some other advantage. Rather, the failure to file a timely motion to dismiss is similar to failure to file a timely notice of appeal, which has been held to constitute ineffective assistance of counsel. E.g. *Kent v. United States*, 423 F.2d 1050 (5th Cir. 1970) It is analogous to failure to file a personal injury case within the statute of limitations, which as most lawyers learn in law school

is equivalent to a surgeon leaving a sponge in a patient during an operation.

The failure of counsel for petitioner here to file a timely motion resulted, as in *Easter*, in failure of counsel to "assert that which may have been his only defense." (539 F.2d at 666) The remainder of the two-day case against petitioner consisted principally of the testimony of alleged accomplices who, if believed, left petitioner with no defense, which is entirely consistent with counsel's statement to petitioner that the motion to dismiss was the strongest part of the case.

The failure of counsel for petitioner to raise his claims of vindictive and selective prosecution was compounded by numerous other errors and omissions which are detailed above at pp. 1-9 of the statement of the case. Most notably, counsel for petitioner failed to exploit inconsistencies in the government's case and failed to request an instruction on accomplice testimony in a case predicated entirely on the testimony of alleged accomplices. Counsel also failed to raise other points which prompted the Court of Appeals to reject them on the grounds that they were waived.

In sum, this case is also appropriate for certiorari because it presents the question of effective assistance of counsel in the context of the court of appeals decision that petitioner's strongest defense was waived by failure of counsel to file a timely motion.

CONCLUSION

For the reasons stated above, it is respectfully requested that this petition be granted.

Respectfully submitted,

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APPENDIX 1

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 81-2565

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD JARRETT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 CR 666—**Bernard M. Decker**, *Judge.*

ARGUED SEPTEMBER 13, 1982—DECIDED APRIL 5, 1983

Before WOOD and POSNER, *Circuit Judges*, and DUMBAULD, *Senior District Judge.**

WOOD, *Circuit Judge.* This appeal, raising a variety of issues, arises from a jury conviction under 18 U.S.C. § 1951 ("the Hobbs Act") for the armed robbery of Alfred's Orange Blossom Jewelers ("Orange Blossom") in Oak Lawn, Illinois, on December 15, 1977. The court sentenced Jarrett as a dangerous special offender under 18 U.S.C. § 3575 to twenty-five years imprisonment.

* The Honorable Edward Dumbauld, United States Senior District Judge for the Western District of Pennsylvania, is sitting by designation.

I. *Jurisdiction*

Jarrett asserts that the federal government lacked both constitutional power and statutory authority to prosecute him for the robbery of the Orange Blossom. According to Jarrett, the Hobbs Act does not permit the federal government to bring a criminal prosecution for a local robbery of a retail store upon a *de minimis* showing of effect on interstate commerce. Jarrett argues that, although the *de minimis* standard applies in extortion cases under the Hobbs Act, a more exacting standard should apply in robbery cases because of constitutional limits on the power of the federal government imposed by the reservation of power to the states to prosecute traditionally local offenses under the Tenth Amendment.[1] Jarrett points out that traditionally robbery is a local offense whereas extortion is not. Thus, Jarrett concludes, the government failed to establish Hobbs Act jurisdiction in this case because, "of the $38,952.03 listed stolen, the Government proved that about $2,000 worth of interstate commerce was 'affected,'" a figure which establishes only a *de minimis* effect on commerce. An examination of the statutory language of the Hobbs Act, the legislative history of the Act, the cases interpreting the Act, and the cases which examine the Tenth Amendment refute this position.

Nothing on the face of the Hobbs Act indicates a congressional intent to define the phrase "affects commerce" more narrowly with respect to the offense of robbery as opposed to the offense of extortion.[2] To the contrary, the

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[1] Although Jarrett cites to the Ninth Amendment, his argument is essentially a Tenth Amendment argument. *Cf.* J. Ely, Democracy and Distrust at 34-41 (1980). In any event, the Tenth Amendment provides a stronger argument than does the Ninth Amendment.

[2] Title 18 U.S.C. § 1951 provides:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts

(Footnote continued on following page)

statute places robbery and extortion on equal ground regarding the jurisdictional requirement of affecting commerce. Such equal placement and treatment provides strong evidence that Congress intended the use of the same standard in determining effect on commerce by robbery or extortion.

The legislative history provides no support for Jarrett's contentions. Congress clearly intended to define as a federal crime conduct that it recognized as punishable under state law. *United States v. Culbert*, 435 U.S. 371, 379 (1978). The legislative debates contain numerous statements to the effect that the conduct reached by the Hobbs Act was already subject to punishment under state robbery and extortion statutes.[3] Representatives

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[2] *continued*

or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

* * *

(3) The term "commerce" means . . . commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

[3] *See, e.g.*, 91 Cong. Rec. 11848 (1945) (remarks of Rep. Powell) ("Extortion and robbery are crimes in all 48 States."); *id.* at 11900 (remarks of Rep. Hancock) ("robbery and extortion, two crimes which are recognized as serious in every State in the Union. . . . The courts of the States of this country have tried thousands of cases of robbery and extortion."); *id.* at 11901 (remarks of Rep. Gwynne) ("Of course, the state law prohibits robbery and extortion. Unquestionably State indictments could have been returned against the members of this union. The fact is, however, such indictments were not returned. It is a breakdown of law enforcement reminding the Congress of its duty to protect interstate commerce by the enactment of this bill."); *id.* at 11916 (remarks of Rep. Patrick) ("If you gentlemen can convince me that any state in the Union in which these depredations to which reference has been made

(Footnote continued on following page)

who opposed the Hobbs Act contended that the Act interfered with the rights of the states.[4] In passing the bill, however, Congress concluded that "the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so." *United States v. Culbert*, 435 U.S. 371, 380. Contrary to Jarrett's position, Congress perceived *both* extortion and robbery to be crimes traditionally subject to state prosecution.

Jarrett cites no case which distinguishes between the degree to which commerce must be affected for purposes of invoking federal jurisdiction for a charge of robbery and for a charge of extortion under the Hobbs Act. Courts draw no such distinction and require only a *de minimis* effect for robbery as well as extortion.

In *Stirone v. United States*, 361 U.S. 212, 215 (1960), an extortion prosecution, the Court stated that the Hobbs Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." Reaffirming this view in *United States v. Culbert*, 435 U.S. 371 (1978) (extortion prosecution), a unanimous Supreme Court said:

> the statutory language [of the Hobbs Act] sweeps within it all persons who have "in any way or degree

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[3] *continued*
has not adequate laws to convict people for robbery and for every one of the things set out here, I will vote for this bill."); *id.* at 11906 (remarks of Mr. Robison) ("The definition of robbery and extortion set out in this bill . . . are defined in substantially the same way by the laws of every State in the Union.").

[4] 91 Cong. Rec. 11903 (remarks of Rep. Welch); *id.* at 11848 (remarks of Rep. Powell) ("Mr. Speaker, this is another ridiculous threat against democracy. It is the more ridiculous because it comes from the great proponent of States' rights. Extortion and robbery are crimes in all 48 States. . . . Why then gentlemen of the States' rights school, do we need Federal legislation.").

> . . . affect[ed] commerce . . . by robbery or extortion." . . . These words do not lend themselves to restrictive interpretation; as we have recognized, they "manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence."

Id. at 373.

In a Hobbs Act robbery prosecution, *United States v. Caldarazzo*, 444 F.2d 1046 (7th Cir.), *cert. denied*, 404 U.S. 958 (1971), this circuit drew no distinction between the jurisdictional requirement for robbery and extortion cases. In *Caldarazzo*, we ruled that "[t]he Hobbs Act provides federal sanctions for *robbery* which 'in any way or degree obstructs, or delays, or affects commerce or the movement of any article or commodity in commerce.'" *Id.* at 1048-49.

We have previously held in an extortion case that "the commerce element [of the Hobbs Act is] satisfied where the actual impact on commerce is *de minimis*, . . . or where, in the absence of proof of an actual impact, there is a realistic probability that the extortionate transaction will have some effect on interstate commerce." *United States v. Hedman*, 630 F.2d 1184, 1195 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). Thus, in light of *Caldarazzo* and *Hedman*, we hold that the *de minimis* standard applies to robbery cases under the Hobbs Act.

The Eighth Circuit, in *Nick v. United States*, 122 F.2d 660 (8th Cir.), *cert. denied*, 314 U.S. 687 (1941), addressed a Tenth Amendment attack on the validity of the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979, 18 U.S.C. §§ 420a-420e (the predecessor to the Hobbs Act). In upholding the validity of the Act, the court, 122 F.2d at 668, explained as follows:

> The argument as to the Tenth Amendment is that this Act undertakes to invade State jurisdiction and deal with domestic violence—in short, is an attempt to exercise the police power reserved to the States

> under the Amendment. Clearly this is not true. The Act is an exercise of police power but it is based upon the protection of interstate commerce. If it comes within the commerce clause of the Constitution it is not open to this objection. If it does not come within the commerce clause it would be invalid whether it involved an exercise of police power or not. That the Act is within the commerce clause seems clear. . . .

Similarly, the Ninth Circuit in *Carbo v. United States*, 314 F.2d 718, 733 (9th Cir. 1963) held that the Hobbs Act is within the power of Congress and does not contravene the Tenth Amendment.[5]

Rather than regulate the internal functions of the states, the Hobbs Act regulates the activities of individuals.[6] Furthermore, the Hobbs Act does not *displace* the states' freedom to prosecute robberies or extortions. *See generally Bartkus v. Illinois*, 359 U.S. 121 (1959)

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[5] *See generally United States v. Darby*, 312 U.S. 100, 114 (1941) ("It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."); *Hoke v. United States*, 227 U.S. 308, 321 (1913) (Tenth Amendment challenge to White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, rejected); *United States v. Staszcuk*, 517 F.2d 53, 58-59 (7th Cir.), (*en banc*), *cert. denied*, 423 U.S. 837 (1975); *Gagliardo v. United States*, 366 F.2d 720, 722 (9th Cir. 1966) (18 U.S.C. § 1464 does not violate Tenth Amendment); *Marshall v. United States*, 355 F.2d 999, 1004 (9th Cir. 1966) (rejecting Tenth Amendment challenge to 18 U.S.C. § 1952), *cert. denied*, 385 U.S. 815 (1966); *United States v. Vignola*, 464 F. Supp. 1091, 1099 n.23 (E.D. Pa. 1979) (unsuccessful Tenth Amendment attack of RICO, 18 U.S.C. § 1961 *et seq.*), *affirmed*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

[6] *See generally United States v. Gillock*, 445 U.S. 360, 371 (1980); *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). *See also Equal Employment Opportunity Commission v. Wyoming*, 51 U.S.L.W. 4219 (March 2, 1983) (narrowly limits *Usery*).

(Illinois robbery conviction following federal prosecution and acquittal of bank robbery presents no double jeopardy problem). The Hobbs Act presents no unconstitutional intrusion upon the sovereignty of the states and, thus, is a constitutional exercise of the commerce power.

II. *Jury Instruction on Affecting Commerce Element*

Jarrett contends that the district court's instruction respecting the necessary element of interstate commerce was inadequate. According to Jarrett, the instruction which the trial court gave "improperly delegated to the jury" the question of law of whether the robbery affected interstate commerce. Thus, Jarrett argues, the trial court erred in instructing the jury in terms of the governing legal standard instead of requiring the jury to determine only the factual questions supporting a finding of effect on commerce, such as whether the Orange Blossom store received jewelry from out-of-state suppliers. Jarrett fears that the error "diverted the jury from its special office of examining the evidence, and making findings of fact only."

United States v. Kuta, 518 F.2d 947, 951-52 (7th Cir.) (a Hobbs Act case), *cert. denied*, 423 U.S. 1014 (1975), and *United States v. Sweet*, 548 F.2d 198, 202 (7th Cir. 1977) (18 U.S.C. § 844(i)), *cert. denied*, 430 U.S. 969 (1978), held that the court determines as a jurisdictional matter whether interstate commerce has been affected and the jury finds whether the underlying facts exist. On the issue of the requisite nexus to commerce, the district judge in this case instructed the jurors:

> Now, the defendant is charged, in effect, with the crime of obstructing, delaying and affecting interstate commerce by knowingly and willfully and unlawfully committing robbery. . . .
>
> * * *
>
> Now, the term "commerce" means all commerce between any point in the state and any point outside thereof.

> The robbery here need only have a minimal effect on commerce and it is not necessary for you to find that the defendant knew or intended that his actions would in any way affect commerce, it is only necessary that the natural consequences of the acts committed by the defendant charged in the indictment was to affect commerce in any way or degree.

Record at 367-68.[7]

In dicta, we approved a similar instruction pertaining to the element of commerce under the Hobbs Act in *United States v. Staszcuk*, 517 F.2d 53, 55 n.6, 59 (7th Cir.) (*en banc*), *cert. denied*, 423 U.S. 837 (1975). Moreover, no prejudice resulted to Jarrett because the underlying jurisdictional facts were not controverted. In any event, Jarrett failed to object to the instruction at trial. Fed. R. Crim. P. 52(a).

III. *Selective Prosecution*

Jarrett also raises a claim of selective prosecution.[8] He argues that it is not a claim which must be raised in a pretrial motion under Rule 12(b) of the Federal Rules of Criminal Procedure[9] and, therefore, that he did not waive

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[7] In *United States v. Stubin*, 446 F.2d 457, 465 (3d Cir. 1971), the Third Circuit examined a similar instruction and concluded that no plain error resulted.

[8] Although Jarrett also claims vindictive prosecution, this claim fails since vindictive prosecution has as its basis an increase in charges or a new prosecution allegedly brought in retaliation for the exercise of constitutional rights. Here there is a single prosecution, and no increase in charges. Jarrett apparently wishes to equate his appearance as a witness before the 1978 grand jury with a criminal proceeding against him personally. This, however, is not the type of situation that falls within the perimeters of a vindictive prosecution defense. *Blackledge v. Perry*, 417 U.S. 21 (1974); *United States v. Wilson*, 639 F.2d 500 (9th Cir. 1981).

[9] Rule 12(b) provides:

> Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions

(Footnote continued on following page)

that defense by failing to file his motion until after the completion of the trial. We disagree.

It seems clear that a request for dismissal based on selective prosecution must be raised before trial. *United States v. Taylor*, 562 F.2d 1345, 1356 (2d Cir.), *cert. denied*, 432 U.S. 909 (1977); *United States v. Oaks*, 508 F.2d 1403, 1404-05 (9th Cir. 1974), *cert. denied*, 426 U.S. 952 (1976). In order to gain an evidentiary hearing on the issue of selective prosecution, the defendant must make a *prima facie* case based on facts "sufficient to raise a reasonable doubt about the prosecutor's purpose." *United States v. Falk*, 479 F.2d 616, 620-21 (7th Cir. 1973). To do this, the defendant must show (1) that the prosecutor engaged in intentional discrimination based on an impermissible consideration, such as race, religion, or exercise of constitutional rights, *United States v. Peskin*, 527 F.2d 71, 86 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976), and (2) that "[w]hile others similarly situated have not generally been proceeded against because of conduct forming the basis of the charge against him, he has been singled out for prosecution." *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). These issues bring into question the institution of the prosecution; Rule 12(b) requires such issues to be raised prior to trial. The suf-

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[9] *continued*
may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceeding); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under Rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

Fed. R. Crim. P. 12(b).

ficiency of these showings can, in the majority of cases, be determined without trying the general issue, which in this case was whether Jarrett was involved in the Orange Blossom robbery in violation of the Hobbs Act.

While it is suggested in *United States v. Wilson*, 639 F.2d 500, 506 (9th Cir. 1981) (Real, J., concurring), that a selective prosecution defense may require a full trial in order to develop the relevant facts, this is allowed for within the pretrial motion scheme, by Rule 12(e).[10] The court may, for "good cause," defer decision of a constitutional objection if production of evidence will clarify the issue, or if factual uncertainties require "trial of any nontrivial *part* of 'the general issue. . . .'" *United States v. Barletta*, 644 F.2d 50, 57-58 (1st Cir. 1981) (emphasis in original); Wright, Federal Practice and Procedure: Criminal 2d § 194. The stringency of the time requirements are similarly softened by Rule 12(f) which allows the trial judge to relieve a defendant of his waiver "for cause shown." The policies behind restricting the time for making a motion for dismissal based on selective prosecution are well served by Rule 12(b), while arguments against including selective prosecution in those motions covered by 12(b) are mitigated by the deferral and waiver relief provisions of Rules 12(e) and (f). The district court was correct in finding that Jarrett waived his selective prosecution motion by failure to file until two months after trial. We need not reach the issue of whether Jarrett could have been relieved of his waiver,

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[10] Rule 12(e) provides:

> Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

Fed. R. Crim. P. 12(e).

since he never requested such relief from the district court.[11]

IV. *New Trial*

Jarrett claims entitlement to a new trial, citing as grounds (1) new evidence or perjured testimony, (2) government withholding of discovery materials, (3) rebuttal on a collateral matter, and (4) admission of hearsay.[12] Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, a court may grant a new trial to a defendant "if required in the interest of justice."[13] After reviewing the record and the parties' arguments, we are convinced that the interest of justice does not require a new trial.

Jarrett argues that "the jury never heard a critical change in the testimony of his coconspirator, Brown,

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[11] Jarrett's final argument that the government "waived" recourse to Rule 12(f) by responding on the merits to Jarrett's post-trial motion is completely without merit.

[12] Jarrett also contends that because the arrangements between the government and his coconspirators, Willis and Brown, were not binding upon the government prior to testifying, Brown and Willis had a reason to lie. Although this provides an argument to present to the jurors, it is frivolous to contend it provides a basis for a new trial.

[13] Rule 33 provides:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Fed. R. Crim. P. 33.

which occurred subsequent to trial." Thus, the jury lacked an important factor in evaluating Brown's credibility.

At trial, Jarrett's counsel asked Brown the following questions and received the following answers:

> Q. Isn't it a fact, Mr. Brown, that you didn't see Ronald Jarrett on December 15, 1977, until after the Orange Blossom robbery had been concluded and accomplished?
> A. No.
> Q. Isn't that a fact?
> A. No, it is not.
> Q. Would you lie to help yourself, sir?
> A. No, I would not.

Subsequently, at the sentencing hearing, counsel asked Brown about his parole release in 1968. Brown admitted that he obtained a regular job, not because he wanted or intended to live a law-abiding life, but because it was a "necessity to get out on parole." When asked if he would lie to help himself, Brown answered, "I probably would."[14]

Contrary to Jarrett's position, we detect no serious conflict in Brown's testimony. In the first passage, Brown denied that he was lying about Jarrett's participation in the robbery in order to help himself. In the second passage, Brown admitted that he would lie on certain occasions, such as obtaining his parole release. Furthermore, during the trial, Brown admitted to lying on a subject more pertinent to the case, stating that he lied to a

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[14] Counsel then asked Brown the following questions and Brown gave the following responses:

> Q. Right. In fact, the more serious the matter the more you lie, isn't that right?
> A. No, not really.
> Q. If it means going to jail, for example, Mr. Brown, you will lie, won't you?
> A. No.
> Q. You won't?
> A. No.

special agent who was investigating the robbery. The jury, therefore, heard Brown admit that he sometimes lied. Finally, accepting Jarrett's contentions arguendo, Brown's testimony at the sentencing hearing does not meet the test for granting a new trial based on newly discovered evidence, *United States v. Hedman*, 655 F.2d 813, 814 (7th Cir. 1981), or based on perjured testimony, *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928).

Newly discovered evidence, to be grounds for a new trial, must be "*material*, and not merely *impeaching* or cumulative." *Hedman*, 655 F.2d at 814 (emphasis added). Here, Brown's testimony is merely impeaching, at best.[15]

For perjured testimony to form the basis for a new trial, the court must be reasonably convinced that the testimony given by a material witness is false and that the jury might have reached a different conclusion had the truth come to light. *United States v. Robinson*, 585 F.2d 274 (7th Cir. 1978) (en banc), *cert. denied*, 441 U.S. 947 (1979); *Larrison v. United States*, 24 F.2d 82 (7th Cir. 1928). Brown's statement at the sentencing hearing does not convince us that he was lying while testifying at Jarrett's trial. Moreover, the fact that Brown lied at his parole hearing would not impress the jury to reach a different verdict because Brown already admitted to them that he lied to the special agent.

Jarrett claims that the government withheld certain documents necessary for the defense to impeach witnesses for the prosecution. Unfortunately, Jarrett does not describe in particulars the nature of the documents he sought to discover.[16] The district court restricted discovery to "any statements of the witnesses that might be

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[15] Under no stretch of the imagination can Brown be deemed to have recanted his testimony at trial. 8A Moore's Federal Practice ¶33.05 (2d ed. 1982).

[16] Although Jarrett's argument alludes to a curtailment on impeachment in the nature of prior convictions and misdeeds, a thorough study of the transcript of the district court proceedings reveals no such limitations.

usable for impeachment purposes, but not every statement made by witnesses regarding Jarrett." In clarification, the court ruled, and we agree, that simply because a witness has accused Jarrett of committing another crime does not mean the witness is biased.[17] Moreover, even if evidence that prosecution witnesses accused Jarrett of other crimes indicates bias, such evidence would be cumulative since the witnesses in question here were already accusing Jarrett of the Orange Blossom robbery. There is no indication or suggestion that the witnesses were accusing Jarrett of crimes so great in number as to connote prejudice or bias. The district court did not err, let alone abuse its discretion, by denying discovery. *See generally United States v. Watson*, 669 F.2d 1374, 1384 (11th Cir. 1982); 10 Fed. Proc., L. Ed. § 26:403 (1982).

Jarrett claims that he was improperly impeached on a collateral matter. At trial he testified that when he was visited by ATF agents in April of 1978 (about four months after the robbery), he did not have any police scanners or walkie-talkies in his home. In rebuttal, an ATF agent testified, over objection, that when he went to Jarrett's home on April 20, 1979, he found walkie-talkies.

A matter is collateral if the impeaching fact could not have been introduced into evidence for any purpose other than contradiction. 3 Weinstein's Evidence ¶607 at 607-64 (1981). We agree with Jarrett that proof of possession of walkie-talkies sixteen months after the crime was committed is collateral. However, this impeachment resulted in harmless error beyond a reasonable doubt. Fed. R. Crim. P. 52(a); Fed. R. Evid. 103(a); *Chapman v. California*, 386 U.S. 18 (1967). The remoteness in time and lack of relevance should have been obvious to the jurors. Possessing walkie-talkies is hardly inflammatory.

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[17] Nor is it "evidence favorable to an accused . . . material either to guilt or to punishment" which must be disclosed according to the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

Jarrett challenges the instruction given by the court relating to the rebuttal testimony.[18] At trial, defense counsel raised no objection; rather, counsel specifically approved the instruction. Tr. 360 ("That's fine, your Honor, that's good."). We do not consider the instruction to constitute plain error. Fed. R. Crim. P. 52; Fed. R. Evid. 103(d). Rather, it appears to be an agreed upon stipulation as to the date of the agents' visit[19] and a limiting instruction designed to eliminate any prejudice to Jarrett.

Jarrett's final ground for a new trial—improperly admitting hearsay—is frivolous, not meriting detailed discussion. According to Jarrett's contention, the district court erroneously concluded that "the Government had established a joint venture" between Rodriguez, Jarrett, Brown, and Willis such that statements made by the now deceased Rodriguez were not hearsay under Federal Rule of Evidence 801(d)(2)(E). The independent evidence of the conspiracy was more than sufficient to meet the preponderance test adopted in *United States v. Santiago*, 582 F.2d 1128, 1135 (7th Cir. 1978). Willis and Brown both testified to the participation of the four in the crime, and to various admissions by Jarrett, Fed. R. Evid.

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[18] The district court then instructed the jurors:

> Now, there was some evidence introduced that the defendant had possession of certain electronic equipment on the occasion of the visit of certain agents to his home. Defendant has denied that he had any such equipment on the occasion of the visit. The date of such visit has now been established as having taken place in April of 1979. The evidence is to be considered by you only insofar as it may affect the credibility of the defendant. It must not be considered by you as evidence of the guilt of the defendant of the crime for which he is on trial.

[19] Jarrett claims the district court erred in using the date 1979 in the instruction. However, defense counsel, in closing argument, said, "And [Jarrett] was cross-examined about something that happened in 1979, . . . did he have some walkie-talkies . . . in his house." Tr. 344.

801(d)(2)(A). Their testimony clearly established that Rodriguez was a coconspirator of Jarrett's within the meaning of *United States v. Gil*, 604 F.2d 546 (7th Cir. 1979). Furthermore, Jarrett failed to object to the admission of Rodriguez's statements at trial.

V. *Sentencing*

Jarrett attacks his sentence imposed under the dangerous special offender statute, 18 U.S.C. § 3575, arguing that the district court's findings concerning "dangerousness" are not supported by the record and are clearly erroneous, that the court abused its discretion in relying upon the witness Mara and the police reports for corroboration of the witness Brown's testimony, and that the court erred in not explaining "why a twenty five year sentence is required when the maximum under the statute is twenty years." We find Jarrett's claims meritless.

Jarrett contends the finding of dangerousness to be unsupported by the record because Brown's testimony is incredible. As the finder of fact in the sentencing hearing, however, the court was entitled to accord such weight as it saw fit to Brown's testimony. *United States v. Inendino*, 604 F.2d 458, 463-64 (7th Cir.), *cert. denied*, 444 U.S. 932 (1979); *United States v. Williamson*, 567 F.2d 610, 615-16 (4th Cir. 1977). Additionally, Brown's testimony was corroborated by Mara's testimony and by the police records.

Jarrett complains that Mara did not testify as to his personal knowledge concerning Jarrett's participation in a burglary of a Jewel grocery store and other incidents. Pursuant to Rule 1101(d)(3) of the Federal Rules of Evidence, the Rules do not apply in sentencing hearings. Thus, the Rules relating to hearsay do not apply. A judge may properly conduct a broad inquiry, "largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972). Hearsay evidence is admissible in sentencing proceedings, including dangerous special offender proceedings. *United*

States v. Inendino, 604 F.2d 458, 463 (7th Cir.), *cert. denied*, 444 U.S. 932 (1979).

Similarly, regarding Jarrett's claim of lack of authentication, Rule 901 of the Federal Rules of Evidence is inapplicable. In particular, however, Jarrett points out that the FBI agent at the sentencing hearing did not make copies of the police reports himself, or compare them with the originals for accuracy. However, the copies in question were xeroxes of the original—"admissible to the same extent as an original" under Rule 1003 of the Federal Rules of Evidence, unless "a genuine question is raised as to the authenticity of the original." Fed. R. Evid. 1003. Thus, even if the Rules applied, the fact that the agent did not make the xerox or conform it with the original would make no difference. Although defense counsel called the accuracy into question in form, he did not do so in substance. Further, the district court assured Jarrett he would consider the reports "with a grain of salt," and would consider them for the "limited purpose of . . . determining whether or not there is any corroboration in this record as to the testimony given by Brown." Tr. 343-44.

Finally, Jarrett contends that the district court erred in failing to explain its findings concerning "dangerousness" under 18 U.S.C. § 3575(f). "A defendant is dangerous" under Section 3575(f) "if a period of confinement longer than that provided for such felony is required for the protection of the public from further criminal conduct by the defendant." 18 U.S.C. § 3575(f). In *United States v. Neary*, 552 F.2d 1184, 1193 (7th Cir.), *cert. denied*, 434 U.S. 864 (1977), we noted that a trial court must make additional factual determinations of "special" and "dangerous" after a verdict of guilty to support the imposition of a sentence longer than the maximum sentence normally applicable to the crime. A finding of dangerousness under Section 3575(f) involves an evaluation of the defendant's character and a prediction of future criminal conduct, "matters which are traditionally left to [the] wide discretion of a sentencing court." *Id.*

Contrary to Jarrett's contention, the district court explained its findings concerning dangerousness. The court's explanation is in accord with the construction of Section 3575(f) in *Neary*. The district court said,

> [T]his defendant was in charge of an operation and he was the mastermind behind it, he was the organizer of it and he was the one who determined after the Orange Blossom robbery took place who was going to get what . . . .
>
> But in addition to that . . . this defendant has, as a juvenile, two arrests, on 58 different occasions he has been arrested as an adult. He had two convictions as a juvenile. There were 13 as an adult.
>
> * * *
>
> Now, when this information was finally collected . . . the government apparently decided . . . that *society needed some kind of better protection from the continuance of this criminal enterprise* in which the defendant was engaged and . . . the only way in which he was making his living.
>
> . . . [I]t is clear to me from this record, without any question, that this defendant has been a professional criminal all of his adult life and he qualifies beyond question as a dangerous special offender . . . .
>
> . . . [Y]our past record also indicates to me that probation and parole are terms which, apparently, have little meaning for you.

Thus, the district court found Jarrett to be dangerous to society because of his criminal life-style.[20] As the trial court judge clearly articulated the reasoning behind his decision in finding Jarrett to be dangerous, we hold that

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[20] Jarrett also alleges that the district court failed to comprehend the language of Section 3575(f). This contention is frivolous. The record reflects a clear understanding of the statute by the district court.

the district court did not abuse its discretion. *United States v. Madison*, 689 F.2d 1300 (7th Cir. 1982).

VI. *Ineffective Assistance of Counsel*

Jarrett's final claim is that he did not receive effective assistance of counsel as guaranteed by the Sixth Amendment. Jarrett makes numerous allegations respecting this claim, ranging from failure to timely file a motion asserting selective prosecution to failure to object to the introduction of certain evidence. As relief, Jarrett requests this court to reverse and remand for a new trial or, in the alternative, to remand for a hearing on the ineffective assistance of counsel claim.

This claim is not properly before us. Just prior to sentencing, Jarrett filed a bare motion asserting ineffective assistance of counsel. The district court denied it. At a subsequently held hearing on the motion alleging denial of effective assistance, the district court indicated that it would permit defense counsel to file affidavits in support of this motion, would allow briefing, and then would reconsider its prior ruling. In response, however, defense counsel indicated he preferred not to address the issue further, opting instead to seek collateral relief pursuant to 28 U.S.C. § 2255 if this court did not rule favorably on appeal. We believe defense counsel's original inclination is correct. As we stated in *United States v. Lang*, 644 F.2d 1232, 1240 (7th Cir.), *cert. denied*, 454 U.S. 870 (1981):

> First, this type of allegation is more appropriately dealt with by the district court. Procedurally, several vehicles are available, including Rule 33 of the Fed.R.Crim.P., Motion for a New Trial, or the collateral relief available to federal prisoners under 28 U.S.C. § 2255. Second, examination of the record does not provide clear evidence of the ineffective assistance of counsel, the failure alleged being those of litigation strategy. Nor do we have the impressions and findings of the district judge to guide us.

For the foregoing reasons, the judgment of the district court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX 2

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

June 8, 1983.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. EDWARD DUMBAULD, *Senior District Judge**

No. 81-2565

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD JARRETT,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 CR 666—**Bernard M. Decker**, *Judge*.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* The Honorable Edward Dumbauld, United States Senior District Judge for the Western District of Pennsylvania, is sitting by designation.

APPENDIX 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 80 CR 666-1

United States of America vs.
Ronald Jarrett, Defendant

COUNSEL:

In the presence of the attorney for the government the defendant appeared in person on this date, September 17, 1981, with counsel John W. Conniff.

PLEA:

Not guilty.

FINDING & JUDGMENT:

There being a verdict of guilty. Defendant has been convicted as charged of the offenses of knowingly, willfully and unlawfully committing robbery, obstructing, delaying and affecting commerce and unlawfully obtaining property by means of actual and threatened force, violence and fear of injury, immediate and future, to persons and property in their custody and possession; In violation of Title 18, U.S.C. Sec. 1951.

SENTENCE OR PROBATION ORDER:

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney

General or his authorized representative for imprisonment for a period of Twenty Five (25) Years as dangerous special offender within the meaning of Title 18, U.S. Code 3575(e)(1) and 3575(f).

* * * * *

/s/ Bernard M. Decker
U.S. District Judge

Date September 17, 1981

Office-Supreme Court, U.S.
FILED
DEC 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-204

In the Supreme Court of the United States

OCTOBER TERM, 1983

RONALD JARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his claim of selective prosecution by failing to raise the issue prior to trial as required by Fed. R. Crim. P. 12(b).

2. Whether petitioner established a prima facie case of selective prosecution that would entitle him to a hearing.

3. Whether petitioner was denied effective assistance of counsel.

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In the Supreme Court of the United States

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RONALD JARRETT, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 705 F.2d 198.

JURISDICTION

The judgment of the court of appeals was entered on April 5, 1983. A petition for rehearing (Pet. App. 21) was denied on June 8, 1983. The petition for a writ of certiorari was filed on August 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of obstructing, delaying, and affecting commerce by means of robbery, in violation of 18 U.S.C. 1951. He was adjudged a

dangerous special offender (18 U.S.C. 3575), and sentenced to 25 years' imprisonment (Pet. App. 22-23). The court of appeals affirmed (Pet. App. 1-20).

1. The evidence at trial showed that petitioner planned the armed robbery of a jewelry store, assisted by Joseph Rodriquez, David Willis, and Ronald Brown (Tr. 164, 247).[1] After petitioner supplied loaded guns, walkie-talkies, and a police scanner for use in the robbery, the four men drove to the Orange Blossom Jewelry Store in Oak Lawn, Illinois (Tr. 102-105, 145-151, 220-222, 227-231). There, Brown and Willis were instructed to enter the store and remove everything from the safe, while petitioner and Rodriquez remained outside as lookouts (Tr. 233, 247-248). According to plan, Brown and Willis entered the store, held the employees at gun point, and took cash and jewelry from the safe and display window (Tr. 153-157, 237). When petitioner signalled them by walkie-talkie (Tr. 238), Brown and Willis left the store with $39,000 in merchandise and cash (Tr. 41, 158, 239-240). Testimony of the store owner showed that the robbery had a significant effect on interstate commerce (Tr. 20, 43-46; GX 12A, 13, 14, 15, 15, 26A, 26B, 26C).

2. Two months after trial petitioner moved for a judgment of acquittal based on vindictive and selective prosecution (Pet. App. 10). Petitioner alleged that he had been unfairly singled out for prosecution to punish him for exercising his Fifth Amendment privilege against self-incrimination when he was called before the grand jury in April 1979 to testify about an unrelated robbery (Pet. 4).

In response to petitioner's post-trial motion, the government submitted the affidavits of five federal agents. According to these affidavits the investigation of petitioner began

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[1] Willis and Brown testified for the government at trial.

in late 1977, after the $700,000 burglary of another Chicago jewelry store and the subsequent murder of the prime suspect, an associate of petitioner's (R. 61, at 2-3). In April 1979, petitioner was subpoenaed to testify before the grand jury investigating these crimes, but declined to do so on Fifth Amendment grounds. Two months later federal agents obtained information linking petitioner to the murder of Joseph Rodriquez and to the burglary of the Orange Blossom Jewelry Store (R. 61, at 5-6). An investigation was then begun into the armed robbery and the murder (R. 61, at 6). That investigation continued for approximately 18 months; during that time the agents learned more about petitioner's other criminal activities from his associates (R. 61, at 6-7). In October 1980, the investigation was completed, and petitioner was indicted on this charge.

The district court thereafter denied petitioner's motion, ruling that he had waived his vindictive and selective prosecution claims by failing to assert them prior to trial (Pet. App. 10).[2]

ARGUMENT

Petitioner contends (Pet. 12-25) that he has established a prima facie case of vindictive[3] and selective prosecution,

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[2]Petitioner concedes that he did not file a motion for relief on the basis of selective or vindictive prosecution before trial (Pet. 6-7). The first reference to such a motion came on the second day of the three-day trial when petitioner's counsel mentioned to the court that he intended to file one (Tr. 75-76).

[3]As the court of appeals noted (Pet. App. 8 n.8):

> Although Jarrett also claims vindictive prosecution, this claim fails since vindictive prosecution has as its basis an increase in charges or a new prosecution allegedly brought in retaliation for the exercise of constitutional rights. Here there is a single prosecution, and no increase in charges. Jarrett apparently wishes to equate his appearance as a witness before the 1978 grand jury with a criminal proceeding against him personally. This, however, is

and that such a claim need not be raised prior to trial under Fed. R. Crim. P. 12(b). He also argues that if this defense was lost by not being timely presented, he received ineffective assistance of counsel. These claims are without merit.

1. The district court and the court of appeals correctly concluded that petitioner waived his selective prosecution claim by failing to raise it prior to trial. Fed. R. Crim. P. 12(b)(1) states that claims based on "defects in the institution of the prosecution" must be raised before trial. The failure to raise such claims prior to trial "shall constitute waiver thereof." Fed. R. Crim. P. 12(f). Courts that have considered the matter have concluded that a claim of selective prosecution must be raised before trial, and that the failure to do so waives the claim (Pet. App. 9-11). See *United States* v. *Taylor*, 562 F.2d 1345, 1352 (2d Cir.), cert. denied, 432 U.S. 909 (1977); *United States* v. *Radetsky*, 535 F.2d 556, 571 (10th Cir.), cert. denied, 429 U.S. 820 (1976); *United States* v. *Oaks*, 508 F.2d 1403, 1404 (9th Cir. 1974); *United States* v. *Berrigan*, 482 F.2d 171, 175 (3d Cir. 1973).

Petitioner cites no contrary authority. Instead he argues (Pet. 19) that selective prosecution is not a defense "based on defects in the institution of the prosecution" (Fed. R. Crim. P. 12(b)(1)), but is rather, like double jeopardy, a defense that may be asserted either before or at trial. But it is evident that a claim of selective prosecution is in fact more akin to claims of police misconduct in obtaining evidence

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not the type of situation that falls within the perimeters of a vindictive prosecution defense. *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *United States* v. *Wilson*, 639 F.2d 500 (9th Cir. 1981).

Petitioner in fact concedes (Pet. 15) that the court of appeals was "technically correct" and in accordance with "prevailing views" in finding that his claim was really one of selective, rather than vindictive, prosecution.

(Fed. R. Crim. P. 12(b)(3); *United States* v. *Johnson*, 614 F.2d 622 (8th Cir. 1980)), and claims of prosecutorial misconduct before the grand jury (Fed. R. Crim. P. 12(b)(1); *United States* v. *Johnson*, 679 F.2d 54 (5th Cir. 1982) (vindictive prosecution); *Soper* v. *United States*, 220 F.2d 158 (9th Cir.), cert. denied, 350 U.S. 828 (1955) (prosecutorial prejudice)), which are waived if not raised before trial. See also *United States* v. *Wilson*, 639 F.2d 500, 505-506 (9th Cir. 1981). The purpose underlying the requirement in Rule 12(b)(3), for example — equally applicable in the case of selective prosecution motions — is "to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt." Fed. R. Crim. P. 12(b)(3), advisory committee note at 44 (1974 amend.) (emphasis omitted). Moreover, the failure of the defendant to raise even a meritorious claim of selective prosecution until after trial results in the conduct of an unnecessary trial — a waste of the public's resources that should not be tolerated without some showing of justification.

It is true that the issue of double jeopardy is also collateral to the general issue of guilt or innocence. But unlike petitioner's more general claim of unfair treatment, the defense of double jeopardy rests on a specific constitutional guarantee (U.S. Const. Amend. V) for which this Court has shown a unique solicitude both at the trial level and on appeal. Compare *Abney* v. *United States*, 431 U.S. 651 (1977) (right to interlocutory appeal from order denying motion to dismiss on double jeopardy grounds), with *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (no right to interlocutory appeal from order denying motion to dismiss on vindictive prosecution grounds).

Petitioner also cites several oblique references during and after trial to the issue of selective prosecution (Pet. 22-23), and asserts that the district court's comments on those occasions amount to a decision that he is entitled to relief

from waiver under Fed. R. Crim. P. 12(f). Petitioner acknowledges, as he must, that at best the issue was "first raised * * * during trial" (Pet. 22), rather than in advance as required by Rule 12(b)(1). And he offers nothing more than his own unsupported allegations about the waywardness of his counsel by way of explanation for his failure to make a timely motion (Pet. 6-7). But as the court of appeals noted (Pet. App. 10-11), and as petitioner seems to concede (Pet. 6 n. 1), there was no showing made to the district court of the requisite "cause [for] * * * grant[ing] relief from the waiver." Fed. R. Crim. P. 12(f). Under these circumstances the hypothesis that the district court granted such relief — a supposition contradicted by that court's explicit denial of the selective prosecution claim on July 30, 1981 (Pet. 10) —is without merit.

2. Even if petitioner had not waived his claim of selective prosecution, it is clear that he failed to establish even a prima facie case entitling him to a hearing on that issue. In order to be entitled to a hearing on a claim of selective prosecution a defendant must show: (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's decision to prosecute him was based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights (Pet. App. 9). *United States* v. *Heilman*, 614 F.2d 1133, 1138-1139 (7th Cir.), cert. denied, 447 U.S. 922 (1980); *United States* v. *Torquato*, 602 F.2d 564, 570 (3d Cir.), cert. denied, 444 U.S. 941 (1979); *United States* v. *Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). Absent such a showing, the presumption that a criminal prosecution is undertaken in good faith and in a nondiscriminatory manner remains undisturbed. *United States* v. *Niemiec*, 611 F.2d 1207, 1209 (7th Cir. 1980).

Petitioner characterizes his robbery prosecution under the Hobbs Act as very unusual, since "virtually hundreds of local robberies never give rise to Hobbs Act prosecutions" (Pet. 13, 17). While it is true that the federal government does not prosecute every robbery affecting interstate commerce, petitioner has neither alleged nor shown that it is unusual for the federal government to do so in the case of a career criminal (Pet. App. 18) who has committed a serious armed robbery involving a large sum of money.

Petitioner also fails to substantiate his assertion that the government chose to prosecute him for exercising his Fifth Amendment privilege when he appeared before the grand jury. Petitioner concedes that the government did not obtain the evidence linking him to the Orange Blossom robbery until at least the fall of 1979, six months after his appearance before the grand jury (Pet. 4-5). Petitioner was not indicted until a year later. To be sure, petitioner was indicted by the same grand jury before which he had refused to testify. But if the conjunction of those two facts amounts to a claim of selective prosecution, they would provide a defense available to virtually any target of a grand jury inquiry.

3. Petitioner's final contention (Pet. 25-28) is that if the district court and the court of appeals were correct in holding that he waived his claim of selective prosecution, then his lawyer's failure to assert that claim in advance of trial amounted to ineffective assistance of counsel. Petitioner also raises a host of other objections concerning his representation at trial (Pet. 7, 9, 28).

It is obvious, in light of what we have said in point 2, *supra*, that failure to assert petitioner's selective prosecution claim can hardly amount to ineffective assistance of counsel. Petitioner would not have been entitled to a hearing even if his counsel had filed a motion prior to trial. See

United States v. *Maruska*, 717 F.2d 1222, 1223 (8th Cir. 1983); *United States* v. *Whitley*, 670 F.2d 617, 621 (5th Cir. 1982); *Harshaw* v. *United States*, 542 F.2d 455, 457 (8th Cir. 1976); *United States* v. *Yanishefsky*, 500 F.2d 1327, 1331 (2d Cir. 1974); *United States* v. *Hines*, 470 F.2d 225, 230-231 (3d Cir. 1972) ("Effective assistance does not demand that every possible motion be filed, but only those having a solid foundation."). And failure to take the other steps to which petitioner vaguely alludes provides no stronger support for this ineffective assistance claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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